

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT ALAN REUTHER,

Defendant-Appellant.

UNPUBLISHED

February 9, 2006

No. 256479

Wayne Circuit Court

LC No. 03-013693-01

Before: Meter, P.J., Whitbeck, C.J., and Schuette, J.

PER CURIAM.

Defendant appeals as of right from a jury conviction of extortion, MCL 750.213. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

On August 19, 2003, defendant called Richard Failing and had him come over to his house. Defendant later accused Failing of breaking windows, jamming locks, and damaging a piano, which Failing claimed he did not do. Defendant pushed Failing to the ground. Failing tried to call 911 on his cell phone, but defendant grabbed Failing's hand and threw the cell phone to the floor. Failing got out of the house, but before he could get to his truck, Failing testified that defendant "grabbed me, threw me back in the house and demanded a thousand dollars or he was going to really mess me up." Failing offered to write a check to defendant, but defendant demanded cash. Defendant drove Failing to the bank where Failing wrote a check out to cash while defendant stood in line behind Failing. Failing gave defendant the money, after which Failing reported the incident to the police.

Defendant's attorney planned to call Steve Loper, Dale Strubel, and Dan Jeffers, all of whom were expected to testify that they witnessed Failing causing damage to defendant's property and also witnessed Failing's promise to reimburse defendant for those damages. Defense counsel conceded that all three men did not witness the events about which they planned to testify. However, defense counsel noted that at least one of the three, if not two of them, did witness Failing causing the damage to defendant's property. Defense counsel did not initially identify for the trial court which witness, if any, had personal knowledge of this incident. However, defense counsel later advised the trial court that Strubel witnessed Mr. Failing saying to defendant that he would pay defendant for the damages. Defense counsel offered that testimony under MRE 801(d)(1)(B). The trial court did not allow Strubel or Jeffers to testify.

Loper testified, however, that in October 2002, Failing attended a party at defendant's house where he witnessed Failing causing damage to a window at defendant's house.

II. ADMISSIBILITY OF EVIDENCE

First, defendant contends that the trial court erred in excluding Jeffers' and Strubel's testimony. Defendant contends that such evidence was admissible under MRE 613(b).

A. Standard of Review

We review the trial court's ruling regarding the admission of evidence for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). "An error in the admission or exclusion of evidence is not a ground for reversal unless refusal to take this action appears inconsistent with substantial justice." *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003). A preserved nonconstitutional error is presumed to be harmless. The error justifies reversal if it is more probable than not that it determined the outcome of the case. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). An error is not outcome determinative unless it undermined the reliability of the verdict in light of the untainted evidence. *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001).

B. Analysis

Nothing in the record indicates that the witnesses had personal knowledge that the victim had caused the alleged damage. MRE 602. If they did not have personal knowledge and were offering information heard from someone other than the victim, their testimony would constitute hearsay, MRE 801(c), and would not be admissible absent an exception as provided in the rules of evidence. MRE 802. Even if a proper foundation could be laid for the testimony, it clearly related to a collateral matter. Extrinsic evidence may not be used to impeach a witness on a collateral matter, "even if the extrinsic evidence constitutes a prior inconsistent statement of the witness, otherwise admissible under MRE 613(b)." *People v Rosen*, 136 Mich App 745, 758; 358 NW2d 584 (1984). Defendant has not shown error with respect to the exclusion of evidence that the victim had damaged defendant's property.

Nothing in the record establishes that Jeffers had personal knowledge that the victim had offered to pay defendant or that any hearsay offered was admissible. The record showed that Strubel had personal knowledge of the victim making the alleged statement; however, there was no foundation for admission of the evidence. While a witness need not be confronted with a prior inconsistent statement before extrinsic evidence is offered, *People v Parker*, 230 Mich App 677, 682-684; 584 NW2d 753 (1998), it is still necessary to lay a proper foundation for the testimony by eliciting testimony inconsistent with the prior statement. *Merrow v Bofferding*, 458 Mich 617, 631; 581 NW2d 696 (1998); *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995). The victim was not asked and did not testify about offering to pay defendant for the damage. Absent such evidence, there was nothing to impeach, and thus the proposed testimony was not admissible. Defendant has not shown error with respect to the exclusion of evidence that the victim offered to pay defendant for the damage.

III. NEW TRIAL

Next, defendant contends that he is entitled to a new trial because the verdict was against the great weight of the evidence.

A. Standard of Review:

The grant or denial of a motion for a new trial is within the trial court's discretion and will not be disturbed on appeal absent a clear abuse of discretion. *Bosak v Hutchinson*, 422 Mich 712, 737; 375 NW2d 333 (1985). However, the issue has not been preserved for appeal because defendant did not file a timely motion for a new trial in the trial court. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). Therefore, review is precluded unless the defendant demonstrates plain error that affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

B. Analysis

“[P]rosecutions for statutory extortion have generally been characterized by threats of future harm if the victim does not comply with the extortionist’s wishes.” *People v Trevino*, 155 Mich App 10, 19; 399 NW2d 424 (1986). The elements of extortion are: (1) a communication, (2) a threatening accusation of a crime or offense or injury to the person or property or immediate family member of another, (3) with the “intent to extort money or pecuniary advantage as to compel the person so threatened to do or refrain from doing an act against his will.” *People v Krist*, 97 Mich App 669, 675; 296 NW2d 139 (1980).

The evidence showed that defendant assaulted and battered the victim, and threatened to do additional harm unless the victim paid him one thousand dollars. Such evidence was sufficient to establish a threat of injury to another to extort money. The fact that defendant believed the victim was indebted to him by having damaged his property was immaterial. An attempt to collect a valid debt by threat of injury if payment is not made constitutes extortion. *People v Maranian*, 359 Mich 361, 369; 102 NW2d 568 (1960). While defendant complains that the victim’s testimony was inconsistent and lacking in detail, the evidence presented did “not preponderate so heavily against the verdict that it would be a miscarriage of justice to let the verdict stand.” *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001). “Because the evidence reasonably supports the verdict in this case, no miscarriage of justice will result from our failure to consider this issue” *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999).

Affirmed.

/s/ Patrick M. Meter
/s/ William C. Whitbeck
/s/ Bill Schuette